

HONORABLE JAMES L. ROBERT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

v.

MOTOROLA INC., et al.,

Defendant.

No. C10-1823-JLR

REDACTED

MICROSOFT'S OPPOSITIONS TO
DEFENDANTS' MOTIONS IN LIMINE

Noted: October 19, 2012

MOTOROLA MOBILITY, LLC., et al.,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

ORAL ARGUMENT REQUESTED

MICROSOFT'S OPPOSITIONS TO
DEFENDANTS' MOTIONS IN LIMINE - I

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I. Motorola's First Motion in Limine Misrepresents the Scope of Microsoft's Privilege Objections, and Should Be Denied.

In the two depositions Motorola identifies in its motion (Dkt. No. 458, Defendants' Motions in Limine ("MIL") at 1–2), Microsoft witnesses properly limited their responses or declined to answer questions based on clear grounds of privilege, where Motorola's questions expressly sought the content or substance of confidential communications between Microsoft employees and Microsoft lawyers. Microsoft properly objected to Motorola's attempts to probe these privileged communications, but allowed full discovery into Microsoft's position on Motorola's October 2010 demand letters. Microsoft agrees that the content of its attorney-client communications should be excluded—and has no intention of offering testimony on such communications in any event. But Microsoft's privileged objections directed to that specific line of questioning provide no grounds for the broad relief Motorola seeks: to foreclose Microsoft from offering *any* evidence or testimony on vast and ambiguous categories of subject matter related to Motorola's demand letters. Motorola's motion should be denied.

At the deposition of Microsoft employee Amy Marasco, Motorola asked a series of questions concerning internal legal discussions related to Motorola's October 2010 demand letters. Ms. Marasco testified that she had no personal experience in evaluating specific terms to determine whether they comply with RAND requirements and that any information that she possessed about Motorola's demand letters or related Microsoft positions came from her communications with Microsoft lawyers. *See* 10/15/12 Declaration of Christopher Wion ("Wion Decl.") Ex. 1 (Marasco Dep.) at 144:17–20; Dkt. No. 459 Ex. 11 (Marasco Dep.) at 87:23–90:15. Microsoft's privilege-based limiting instructions and objections to Motorola's questioning of Ms. Marasco arose only after Motorola continued to probe the content of those privileged communications. *See, e.g.*, Dkt. No. 459 Ex. 11 (Marasco Dep.) at 88:11–90:9.

As is plain from Microsoft's objections to that line of questioning, Microsoft has no intention of offering Ms. Marasco as a witness concerning Microsoft's internal evaluation of

1 Motorola's letters, because any knowledge she has on those aspects came through privileged
2 conversations. But Microsoft's limited privilege objections as to those specific questions
3 provide no basis for what Motorola seeks through its motion—precluding Microsoft from
4 offering *any* “evidence and testimony relating to the . . . subject matter” it identifies concerning
5 Microsoft's analysis and response to Motorola's demand letters. That Ms. Marasco's personal
6 knowledge of some aspects of those broad subjects came from conversations with Microsoft's
7 lawyers provides no basis to exclude evidence or testimony on Microsoft's positions.

8 In his deposition, Microsoft's Horacio Gutierrez [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 Motorola's demand letters are central evidence to at least the breach portion
18 of this case, and [REDACTED]

19 [REDACTED]. Instead, the identified
20 objections were specifically targeted at Motorola's questions that sought the *content* of
21 privileged communications [REDACTED]
22 [REDACTED]. Even in the passages Motorola complains of, Mr. Gutierrez made every effort to
23 provide as complete a response as he could without divulging privileged communications. *See,*
24 *e.g., id.* at 46:16–47:25.
25
26

1 There was nothing inappropriate about Microsoft's privilege objections; rather, the line
2 drawn and testimony provided fully comport with governing precedent.

3 A fact is one thing and a communication concerning that fact is an entirely
4 different thing. The client cannot be compelled to answer the question, "What
5 did you say or write to the attorney," but may not refuse to disclose any relevant
6 fact within his knowledge merely because he incorporated a statement of such
7 fact into his communication to his attorney.

8 *Davis v. Seattle*, No. C06-1659Z, 2007 U.S. Dist. LEXIS 89856 at *10 (W.D. Wash. Nov. 20,
9 2007) (quotation marks and citations omitted). Microsoft's witness provided full disclosure of
10 the facts underlying Microsoft's positions, but only refused to provide the content of
11 Microsoft's legal communications.

12 The relief Motorola seeks is wildly disproportionate to the privilege objections and
13 limiting instructions that were actually made in Mr. Gutierrez's deposition. Motorola seeks to
14 bar Microsoft from offering *any* "evidence and testimony relating to the . . . subject matter" it
15 identifies concerning Microsoft's analysis and response to Motorola's demand letters. (MIL at
16 2.) Motorola's motion provides no basis for such a request. The objections and limiting
17 instructions made in both depositions were made only to protect privileged communications on
18 those subjects and by no means generally foreclosed inquiry on Microsoft's position or related
19 facts, which Mr. Gutierrez fully provided. Motorola's feigned concerns about "trial by
20 ambush" (MIL at 2) are wholly unfounded. Microsoft's limited privilege assertions provide no
21 basis for the subject matter waiver Motorola seeks.¹

22 Motorola's motion in limine stands in stark contrast to first motion in limine filed by
23 Microsoft. (See Dkt. No. 450 at 1-4.) In that motion, Microsoft sought to preclude testimony

24 ¹ The cases Motorola cites by no means suggest otherwise. In *Lexington Ins. Co. v. Swanson*, No. C05-1614JP,
25 2007 U.S. Dist. LEXIS 53509 (W.D. Wash. July 23, 2007), the court held that a litigant would waive attorney-
26 client privilege if it attempted to put into evidence its reliance on the advice of counsel. *Id.* at *13. At no point
has Microsoft ever suggested that its reliance on advice of counsel would ever be part of the evidence in this case.
In *Turner v. Univ. of Wash.*, No. C05-1575RS1, 2007 U.S. Dist. LEXIS 78281 (W.D. Wash. Oct. 10, 2007), the
court declined to grant a motion in limine that—like Motorola's motion here—sought to exclude "any evidence
regarding issues" for which a party claimed attorney-client privilege, because the movant failed to identify the
specific material sought to be excluded. *Id.* at *3-4.

1 from Motorola's experts based on private conversations with Motorola employees, where
 2 depositions of the same employees on the same topics was obstructed on privilege grounds.
 3 Unlike Microsoft, Motorola intends to use affirmatively information that was the subject of
 4 privilege objections. For example, four of Motorola's experts rely on the factual proposition
 5 that [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED] (*Id.* at 1.) And Motorola's
 9 corporate parent, Google, Inc. ("Google"), invoked privilege to block Microsoft's inquiry into
 10 any factual bases for withholding from Microsoft the license to Motorola's H.264 standard
 11 essential patents that Google, as an MPEG LA H.264 pool licensee, is obligated to grant. (*Id.*
 12 at 2–3.) Google also invoked privilege to block Microsoft's inquiry to any factual basis for
 13 any Motorola assertion that its H.264 standard essential patents are worth more than the rate
 14 presumed reasonable under Google's MPEG LA license. (*Id.*)

15 Microsoft does not intend to call either Ms. Marasco or Mr. Gutierrez at the upcoming
 16 RAND royalty trial.² Microsoft's experts have explained at length in their reports and
 17 depositions why the royalty that Motorola seeks is not RAND, and Motorola clearly
 18 understands the positions and evidence to be offered. [REDACTED]
 19 [REDACTED]
 20 [REDACTED]

21 In contrast,
 22 Motorola's and Google's assertions of privilege barred inquiry into a central disputed factual
 23 issue for the RAND trial—[REDACTED]
 24 [REDACTED]. Microsoft's assertions of
 25 privilege only arose when responses to Motorola's questions would have directly involved
 26 [REDACTED]

² This fact alone renders Motorola's motion abstract at this time.

1 Microsoft's witnesses' communications with Microsoft lawyers, and Microsoft has no
 2 intention of offering testimony from Mr. Gutierrez or any other witness concerning those
 3 communications. Motorola's motion should be denied.

4 **II. Motorola's Second Motion in Limine Should Be Denied Because Microsoft's**
 5 **Expert's Critique of Motorola's *Georgia-Pacific* Analysis Was Properly Disclosed**
 6 **in Expert Reports.**

7 Motorola's motion directed at Microsoft expert Matthew Lynde is ostensibly premised
 8 on the unremarkable proposition that expert testimony should be limited to matters disclosed in
 9 expert reports. (MIL at 3.) But Motorola identifies no suggestion anywhere in Dr. Lynde's
 10 deposition testimony, or in Microsoft's filings or disclosures in this case, that Microsoft might
 11 seek to offer improper testimony beyond the scope of Dr. Lynde's expert disclosures. Instead,
 12 Motorola's motion appears to be an attempt to hinder Dr. Lynde's ability to criticize
 13 Motorola's expert Charles Donohoe at trial, and to prevent Dr. Lynde from offering his own,
 14 properly-disclosed, analysis of an appropriate RAND royalty. Motorola's motion should be
 15 denied.

16 Criticism of Donohoe's "modified *Georgia-Pacific* analysis" is central to Dr. Lynde's
 17 rebuttal report, as Motorola admits. (MIL at 3.) Dr. Lynde's rebuttal report includes forty-four
 18 pages of analysis of Donohoe's unreliable *Georgia-Pacific* "methodology," including detailed
 19 criticisms of Donohoe's use of each of the fifteen factors. (Dkt. No. 457 Ex. 1 (Lynde Reb.
 20 Rpt.) at 12–54.) Motorola's motion identifies no ground for precluding Microsoft from
 21 offering properly-disclosed testimony criticizing Donohoe's analysis.

22 Further, *Georgia-Pacific* and its progeny do not describe an economic "methodology"
 23 at all—the *Georgia-Pacific* factors are simply a non-exhaustive, unweighted list of things
 24 parties might consider in a hypothetical negotiation over a patent license. *See Apple, Inc. v.*
 25 *Motorola, Inc.*, No. 1:11-cv-08540, 2012 WL 2376664, at *9 (N.D. Ill. June 22, 2012). As
 26 Chief Judge Randall Rader of the Federal Circuit explained in a recent interview, "the

1 *Georgia-Pacific* factors are really just a laundry list of various things to be considered. The
2 *Georgia-Pacific* factors were never meant to be a test or a formula for resolving damages
3 issues. They are merely a list of things to consider.” Wion Decl. Ex. 11, Law360.com, “An
4 Interview With Fed. Circ. Chief Judge Rader: Part 1” (Oct. 11, 2012), online at
5 <http://www.law360.com/articles/385311/an-interview-with-fed-circ-chief-judge-rader-part-1>.
6 Dr. Lynde did not perform a “*Georgia-Pacific* analysis” in the sense that he marched through
7 each of those factors and based his conclusion exclusively on such an analysis. He explained
8 at length why he considered that inappropriate. (Dkt. No. 457 Ex. 1 (Lynde Reb. Rpt.) at 41.)
9 But to the extent that the Court chooses to look to any of the *Georgia-Pacific* factors, Dr.
10 Lynde has offered opinions within the ambit of some of those factors. Given their breadth,
11 much of the evidence Dr. Lynde considered in his properly-disclosed analysis of an appropriate
12 RAND royalty in this case fits within one or more of the *Georgia-Pacific* factors. For
13 example, Dr. Lynde has opined that patent pool licenses for broad portfolios of 802.11 and
14 H.264 patents provide the best benchmark for a RAND royalty for Motorola’s patents.
15 Motorola provides no basis for foreclosing opinions of this type disclosed in Microsoft’s expert
16 reports.

17 Motorola’s motion lacks any foundation, and can only be understood as an attempt to
18 impede Microsoft’s ability to offer testimony constituting specific, targeted criticisms of
19 Donohoe’s flawed analysis, or to interfere with Dr. Lynde’s ability offer his own views on
20 considerations that may fall under the *Georgia-Pacific* list, by arguing that such testimony
21 improperly amounts to Dr. Lynde’s own opinion of how to perform a *Georgia-Pacific* analysis
22 in the first instance. All such opinions were properly disclosed in Dr. Lynde’s reports, and
23 Motorola’s motion should be denied.

III. Motorola's Third Motion in Limine Is Premised on a Misrepresentation of Microsoft's Expert's Testimony and Should Be Denied.

The premise of Motorola's third motion in limine is a straw man constructed from a blatant misrepresentation of the deposition testimony of Microsoft's expert Kevin Murphy. Motorola suggests that Microsoft intends to introduce evidence or offer testimony concerning a "royalty-free license" to Motorola's 802.11 and H.264 patents. (MIL at 4.) Motorola uses the quoted phrase "royalty-free license" six times in its motion (MIL at 4–6), leaving the false impression that the words in the quotation marks come from Dr. Murphy. They do not. Motorola is not quoting Dr. Murphy—it is quoting its own counsel, who attempted to recharacterize Dr. Murphy's opinions in an effort to undermine his testimony.

At Dr. Murphy's deposition, Motorola's counsel recast Dr. Murphy's opinion as stating that widespread, unlicensed use of Motorola's patents should be considered a "royalty-free license"—and Dr. Murphy squarely rejected that characterization:

Q. In fact, you have the opinion that they have a royalty free license?

A. No, I wouldn't say -- that would be a legal conclusion. I don't have a legal conclusion. I said as an economic matter they are operating without a -- without a royalty -- there is no royalties being charged. And it's not just Motorola. I mean, there are lots of standard essential patent holders, most of which are not currently licensing the users of the 802.11 technology.

(Dkt. No. 457 Ex. 4 (Murphy Dep.) at 89:14–24; *see also id.* at 118:22–119:1 (“Q. Okay. So your opinion is more the economic reality that they are not paying royalties as opposed to any sort of royalty free license that might result from that use? A. Yes.”).) Motorola's claim that Dr. Murphy “retreated” from any assertion about “royalty-free licenses” (MIL at 5) is baseless—Dr. Murphy at no point made any such assertion. He merely pointed out that many, if not most, of the firms that implement the 802.11 standard do not pay royalties for that use.

The evidence introduced at trial will show that of the hundreds, if not thousands, of patents that are possibly essential to 802.11, very few are the subject of individual or 802.11 portfolio licenses granted by their holders, because all of them constitute minor, incremental

1 portions of a large, complex standard.³ This widespread, unlicensed use of 802.11 patents
 2 suggests broad adoption by many patent holders of the view that these patents have little
 3 licensing value, making it simply not worth the time, effort, and overhead cost to attempt to
 4 license them. Instead, participants in the standard-setting process who hold standard-essential
 5 patents get significant value from simply having 802.11 technology widely used and adopted,
 6 through gains in interoperability and an increased market for their products. [REDACTED]

7 [REDACTED]
 8 [REDACTED]. See
 9 Dkt. No. 423 at 5–7. In short, the market evidence reflects a low value of individual 802.11
 10 portfolio licensing, and Motorola’s own 802.11 licensing history only confirms this.

11 The relevance of the market evidence concerning the lack of licensing of 802.11 patents
 12 ([REDACTED]) is fully disclosed in Dr. Murphy’s report (*see* Wion
 13 Decl. Ex. 3 (Murphy Reb. Rpt.) ¶¶ 4, 28–30), and Motorola’s motion provides no basis for
 14 excluding this entirely proper expert testimony. Motorola’s citations to the law of implied
 15 licenses and equitable estoppel (MIL at 4–5) have nothing to do with Dr. Murphy’s actual
 16 disclosed testimony and are simply irrelevant. Motorola’s motion is premised on words its
 17 own counsel used and that Dr. Murphy never said or adopted. The motion is baseless and
 18 should be denied.

19
 20
 21
 22 ³ Motorola provides no explanation of what it means by stating that this “widespread unlicensed use” is
 “unsupported (and unsupportable)” (MIL at 5–6)—Motorola’s own proposed findings of fact [REDACTED]

23 [REDACTED]
 24 [REDACTED] (Dkt. No. 452
 Ex. 9 (Donohoe Rpt.) ¶¶ 103, 148.) *See also* Wion Decl. Ex. 13, Jorge L. Contreras, “Rethinking RAND: SDO-
 25 Based Approaches to Patent Licensing Commitments,” ITU Patent Roundtable Working Paper (Oct. 2012) at 9
 (“[M]any patent holders engaged in standards development do not actively seek to license or enforce their
 26 SEPs.”).

IV. Motorola's Fourth Motion in Limine Attacking Dr. Peter Rossi's Qualifications Should Be Denied.

Microsoft's survey expert Dr. Peter Rossi provides detailed analysis of the insufficiencies of Motorola expert Dr. R. Sumukar's survey and accompanying expert report. If Microsoft's *Daubert* motion challenging the reliability of Dr. Sukumar's survey is denied, and instead the Court determines that the criticism of Dr. Sukumar's survey simply goes to the weight of the evidence, Dr. Rossi is amply qualified to provide the analysis needed to understand the problems with Dr. Sukumar's survey design and the conclusions he draws. If Microsoft's *Daubert* motion as to Dr. Sukumar is granted, there is obviously no need for Dr. Rossi to testify.

Motorola claims that Dr. Rossi's opinions are "unsupportable" because of a "complete lack of factual underpinnings" for his opinions. (MIL at 6.) But Dr. Rossi's criticisms go to the predicates for structuring and conducting a reliable survey, and the burden for establishing the proper predicates rested with Motorola and Dr. Sukumar, not Dr. Rossi. The Rule 702 basis for Dr. Rossi's criticisms is his unchallenged expertise as a survey expert. Dr. Rossi simply explains that Dr. Sukumar didn't craft a reliable survey, and the fact that Dr. Rossi didn't himself do the work that would have been needed for a reliable survey is irrelevant. Dr. Rossi is not the proponent of this survey: Dr. Sukumar is.

Moreover, if those missing "factual underpinnings" disqualify Dr. Rossi, Motorola has disqualified its own expert. Dr. Sukumar himself disclaimed any technical expertise with respect to the H.264 technologies—interlaced and progressive video, MBAFF ("Macroblock Adaptive Frame/Field")—that were the subject of his survey. Wion Decl. Ex. 4 (Sukumar Dep.) at 54:7–55:1. In pilot testing his own survey, Dr. Sukumar did not attempt to ascertain "the average consumer's familiarity" with "terminology related to Xboxes"—Dr. Sukumar does not know whether the pilot test participants were asked if they knew what 802.11 or H.264 was, and confirmed participants certainly weren't asked if they knew what MBAFF

1 meant. *Id.* at 65:22–66:7. Dr. Sukumar did not even pilot test the questions himself (*id.* at
 2 24:15–25:7) or meet with or interview any of the pilot test respondents. And Dr. Sukumar
 3 conducted the full survey online through the use of a third party (Wion Decl. Ex. 5 (Sukumar
 4 Rpt.) at 7–8), so just like Dr. Rossi, he “did not speak to or otherwise have contact with any of
 5 the participants” in the survey either (*see* MIL at 6).

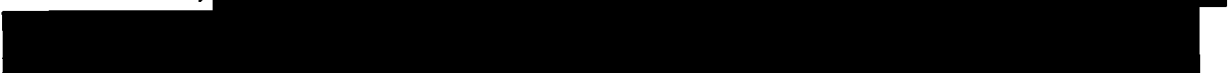

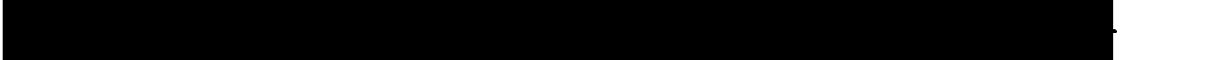
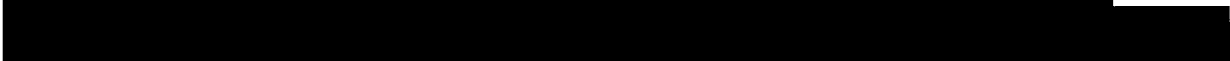
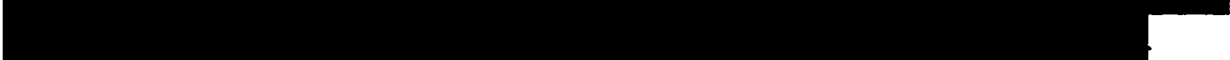
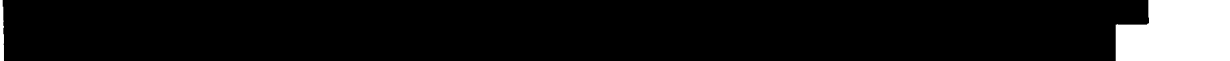
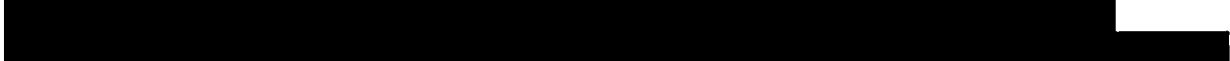
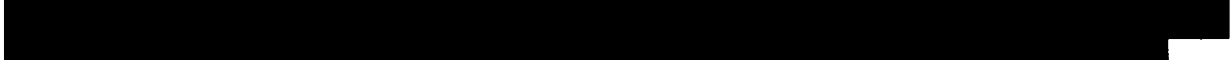
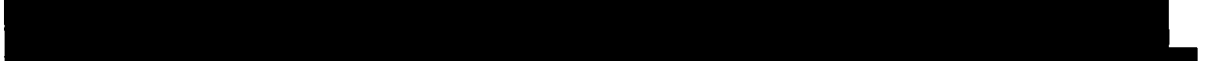
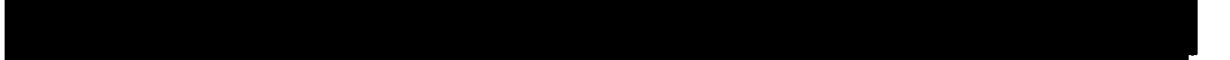
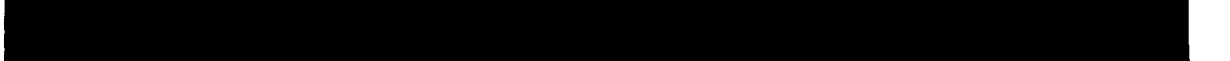
6 As explained in Microsoft’s *Daubert* motion, one of the most glaring problems with Dr.
 7 Sukumar’s survey is the entirely implausible set of responses to the survey’s incomprehensible
 8 questions concerning the usage of H.264 on Microsoft’s Xbox. (*See* Dkt. No. 396 at 20–21;
 9 Dkt. No. 423 at 10–12.) Dr. Sukumar asked respondents what types of video they had watched
 10 on their Xbox, including options like “Progressive” and “MBAFF (Macroblock Adaptive
 11 Frame/Field),” but these terms were never defined for participants, never pilot tested, and Dr.
 12 Sukumar himself admitted at his deposition he had no basis to believe any respondent had any
 13 idea what these terms meant. *See* Wion Decl. Ex. 4 (Sukumar Dep.) at 80:13–81:16, 151:9–
 14 152:13 (“Q. . . . [W]as there any research done to determine if respondents understood what
 15 that [MBAFF] was? A. There was no research done. There was no pilot test done.”). The
 16 survey results on these deeply flawed questions show that 125 respondents purported to: (1)
 17 know what MBAFF means, and (2) know whether they had viewed MBAFF content. (*See*
 18 Dkt. No. 423 at 11; Dkt. No. 397 (Rossi Decl.) ¶ 24.) But even Motorola’s technical expert on
 19 H.264, Timothy Drabik, could not determine what type of video he was watching without
 20 copying the files to a separate computer and analyzing them. (*See* Dkt. No. 398 Ex. 5 (Drabik
 21 Dep.) 133:9–135:14). The presumption that these were meaningful responses reflecting the
 22 usage of H.264 video or Motorola’s patents on the Xbox—as opposed to guesses—is
 23 unfounded, as Dr. Rossi explains. (Dkt. No. 457 Ex. 5 at ¶¶ 34–38.)

24 In a poorly-disguised end-run around this problem with its survey, Motorola’s motion
 25 attempts to bar Microsoft from criticizing these glaring deficiencies at trial, by suggesting that
 26

1 only a technical expert in H.264, performing a survey of Xbox users' understanding of these
2 terms, could be permitted to opine on the subject. Simultaneously, Motorola seeks to offer its
3 own witness to present the results of this survey—but Dr. Sukumar had no technical
4 understanding of these terms, failed to pilot test these questions (which were added after the
5 pilot at the urging of Motorola's counsel), failed to define the terms for participants, and
6 admitted he had no idea what those participants understood about the terms. It is Dr. Sukumar
7 that has "no personal or professional knowledge of the subject matter" (MIL at 7)—yet he
8 designed, conducted, and seeks to offer the survey as evidence in this case. If Dr. Sukumar is
9 permitted to present survey results suggesting that consumers understand what these terms
10 mean, or that they are aware of whether they watch progressive, interlaced, or MBAFF-
11 encoded video on an Xbox, Dr. Rossi must be permitted to explain why that suggestion is
12 implausible and wholly unfounded. Motorola's motion should be denied.

13 **V. Motorola's Fifth Motion in Limine Should Be Denied Because Valuations of**
14 **Motorola's 802.11 Patents Conducted on Motorola's Behalf Are Clearly Relevant.**

15 In 2003, 

16 
17  See Wion Decl. Ex. 6 (Lynde Rep.) at 24.
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1 [REDACTED]
2 . See Wion Decl. Ex. 7 (Curtis Dep.) at 64:13–65:8.
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 The licensing rates recommended by Motorola's own consultants for its 802.11 patents
16 are undoubtedly relevant to the determination of a RAND royalty for those patents, [REDACTED]

17 [REDACTED]
18 . Motorola's protests to the contrary—
19 [REDACTED]

20 —only reveal the deep-
21 seeded embrace of patent hold-up that runs throughout Motorola's misguided RAND theory in
22 this case. Specifically, Motorola claims that [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]

1 [REDACTED]
2 [REDACTED]. But
3 even further, the statement lays bare Motorola's attempt, consistent from its demand letters
4 through the course of this case, to capture the value of standardization through holdup.

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED] Consistent with the *ex ante* approach endorsed by Judge
9 Posner, the Federal Trade Commission, and academic commentators, InteCap's 2003 valuation
10 is in fact much more likely to indicate a RAND royalty than is Motorola's October 2010 view
11 of the value of its 802.11 portfolio, because the 2003 valuation could not capture the value of
12 standardization that had not yet accrued. *See Apple*, 2012 WL 2376664, at *11; Dkt. No. 407
13 Ex. 16, Federal Trade Commission, *The Evolving IP Marketplace: Aligning Patent Notice and*
14 *Remedies With Competition* (March 2011) at 194; Dkt. No. 407 Ex. 14, Daniel G. Swanson and
15 William J. Baumol, "Reasonable and Nondiscriminatory (RAND) Royalties, Standards
16 Selection, and Control of Market Power", 73 *Antitrust L. J.* 1, 57 (2005).

17 The view of independent consultants hired by Motorola as the value of and appropriate
18 licensing rates for Motorola's 802.11 patents is plainly relevant evidence in this case, no matter
19 how inconvenient Motorola finds it now. Dr. Lynde's consideration of that evidence
20 appropriately acknowledges the different setting in which the analysis was made, and the
21 conclusions he draws—[REDACTED]

22 [REDACTED]—are entirely proper.

23 Motorola's motion should be denied.
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VI. Motorola's Sixth Motion In Limine Provides No Basis for Excluding Evidence of H.264 and 802.11 Patent Pool Licenses and Should Be Denied.

Motorola already filed a *Daubert* challenge to Microsoft's experts, relying on the same straw man argument advanced here: that Microsoft's experts believed only "multilateral *ex ante* negotiations" could inform a RAND royalty, and that such testimony was unreliable. Motorola now urges exclusion of "all evidence and testimony suggesting that these patent pools are proxies for a multilateral *ex ante* negotiation." (MIL at 10.)

As Microsoft has previously explained, *see* Dkt. No. 410 (*Daubert* Opp.), Microsoft's experts' economic framework aims to address problems well-known in the academic literature—hold-up and royalty stacking—from an accepted perspective. Microsoft's experts and academic commentators recognize that standard-essential patent holders may demand royalties from implementers reflecting the value of the standard rather than the value of the patented technology in the absence of a standard. (*See* Dkt. No. 407 Ex. 12, Joseph Farrell *et al.*, "Standard setting, patents, and hold-up", 74 *Antitrust L. J.* 603, 616–18 (2007) (discussing particularly significant risks of hold-up in the context of technical standards); Dkt. No. 407 Ex. 13, Mark A. Lemley and Carl Shapiro, "Patent Holdup and Royalty Stacking," 85 *Texas L. Rev.* 1991 (2007).) And as Microsoft's experts and commentators observe, the RAND commitment is meant to combat such exploitation. *See* Dkt. No. 407 Ex. 15, Carl Shapiro, "Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard-Setting," in Adam B. Jaffe *et al.*, *Innovation Policy and the Economy* (2001), at 10 (noting that RAND commitments "are explicitly intended to reduce or eliminate any 'hold-up' problems"); *Apple*, 2012 WL 2376664, at *11.

The approach taken by Microsoft's experts aims to address these risks inherent in standard-essential patent licensing. Isolating the value of the patented technology helps ensure that patent holders do not hold up implementation by demanding royalties that far exceed their technological contribution, and one method of such isolation considered by Microsoft's

experts—the *ex ante* perspective—finds strong support in the academic literature and from the Federal Trade Commission. (See Dkt. No. 407 Ex. 14, Swanson and Baumol, 73 *Antitrust L. J.* at 57 (RAND “is or approximates the outcome of an auction-like process appropriately designed to take lawful advantage of the state of competition existing *ex ante* (i.e., in advance of standard selection) between and among available IP options.”); Dkt. No. 407 Ex. 12, Farrell *et al.*, 74 *Antitrust L. J.* at 637 (“[C]ourts should interpret the fair and reasonable prong of FRAND as the royalties that would have been voluntarily negotiated before users became committed to using the patented technology.”); Dkt. No. 407 Ex. 16, Federal Trade Commission, *The Evolving IP Marketplace* at 194 (“Courts should cap the royalty [for a RAND-committed patent] at the incremental value of the patented technology over alternatives available at the time the standard was defined.”).)

Microsoft’s experts also consider the aggregate reasonable royalties applicable to a standard, aiming to combat the patent stacking problem by ensuring that the sum of all licenses does not exceed the value of the technology. This perspective finds support not only in the literature, but in Motorola’s own SSO submissions concerning the stacking problem. In a prior joint submission to ETSI (an SSO involved in cellular technology), Motorola suggested that

[REDACTED]

(Dkt. No. 407 Ex. 10 (ETSI Proposal Slides) at

MOTM_WASH1823_0421008 (emphasis in original) (sealed by Order dated 9/13/12, Dkt. No. 433).) Swanson and Baumol describe an *ex ante* auction-like process among available intellectual property options, in which implementers band together to consider competing technologies at prices offered by each intellectual property holder, in a many-sided negotiation. (See Dkt. No. 407 Ex. 14, Swanson and Baumol, 73 *Antitrust L. J.* at 10–25). And Motorola’s

own expert Richard Schmalensee co-authored an article suggesting a possible model in which “various parties could make their cases in court for the relative values of their IP contributions to the standard, in the context of other options considered during the standard’s early developmental phases.” (Dkt. No. 392 Ex. 31 at 705–06.)

The perspective discussed by Microsoft’s experts, which includes both *ex ante* and multilateral considerations, serves as a description of how to avoid the hold-up and stacking problems—but Microsoft’s experts never state that actual multilateral, *ex ante* negotiations must have taken place to produce RAND licenses. Instead, Microsoft’s experts explain how patent pools, including the MPEG-LA and Via Licensing pools for the H.264 and 802.11 standards, respectively, provide evidence of what is reasonable in the standard-setting context, because of how the pools adequately address the hold-up and stacking problems in a manner and setting comparable to what would take place in *ex ante*, multilateral negotiations. Motorola protests that neither pool represents “full participation” by every standard-essential patent holder (MIL at 11)—but Microsoft’s experts never opined that “full participation” was required in order for a license to be a *relevant* comparable to a RAND royalty determination, only that the participation of multiple patent holders lessened the risk of stacking problems, making such licenses better candidates as relevant comparables. (See Dkt. No. 407 Ex. 7 (Simcoe Dep.) at 196:14–197:1; Dkt. No. 407 Ex. 8 (Lynde Dep.) at 50:20–51:15; Dkt. No. 407 Ex. 6 (Murphy Dep.) at 151:6–155:25.)

As to the timing in the formation of the pools, the academic literature recognizes that with respect to prevention of hold-up, the *ex ante* concept is not limited to pre-standardization, but can relate more generally to the period before widespread implementation of the standard:

We start from the principle that FRAND rules should be interpreted as a mechanism by which standard setting organization participants address the problem of patent hold-up when *ex ante* negotiation was absent or inconclusive, and by which they make efficient timing of negotiation possible without inviting hold-up. This implies that courts should interpret the fair and

1 reasonable prong of FRAND as the royalties that would have been voluntarily
negotiated *before users became committed to using the patented technology*.

2 (Dkt. No. 407 Ex. 12, Farrell *et al.*, 74 *Antitrust L. J.* at 637 (emphasis added).) *See also* Wion
3 Decl. Ex. 8, Jonathan L. Rubin, “Patents, Antitrust, and Rivalry in Standard-Setting,” 38
4 *Rutgers L. J.* 509, 518 (2007) (“A hold-up problem can occur . . . as long as a substantial
5 investment has been made in adopting or implementing the standard so that the selection of the
6 standard is economically irreversible.”). Further, Motorola only identifies a six-month gap in
7 2003 between adoption of the H.264 standard and the MPEG LA pool formation (MIL at 11)—
8 hardly a significant delay in which patent holders could expect to capture significant growth in
9 the standard. Motorola also notes that the Via pool was formed in 2005, eight years after
10 adoption of the original 802.11 standard (MIL at 11)—

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED] Wion Decl. Ex. 11 (Dansky Rpt.) at 20. In the
16 end, Motorola’s arguments about the pools prove too much. According to Motorola, the pools
17 are not “multilateral” enough, or are not sufficiently “*ex ante*”—but if true, that would only
18 mean that the pool rates are *higher* than a RAND royalty, because the participants could have
19 engaged in stacking or tried to capture hold-up value.

20 The pool rates plainly represent what a large group of standard-essential patent holders
21 consider a reasonable royalty for a license to their 802.11 or H.264 patents. The large numbers
22 of licensee and licensors—especially in the MPEG LA pool—reflect significant acquiescence
23 to the reasonableness of the pool rates for patented technology necessary to implement the
24 H.264 standard. *Cf. Hanson v. Alpine Valley Ski Area, Inc.*, 718 F.2d 1075, 1078 (Fed. Cir.
25 1983) (noting that “a single licensing agreement does not generally demonstrate uniformity nor
26

1 acquiescence in the reasonableness of the royalty rate"). While Motorola protests that it does
 2 not license its patents in these pools (MIL at 10)⁴, that does not render the pools irrelevant—
 3 [REDACTED]
 4 [REDACTED]. (See Dkt. No 284 at 7; Dkt. No. 286 Exs. 5–6 (sealed by
 5 Order dated 6-6-12, Dkt. No. 337)). To the contrary, there is no reason to believe Motorola's
 6 standard-essential patents have any greater economic value to a prospective implementer of
 7 either the 802.11 or H.264 standard than do those essential patents in the pools—all are simply
 8 necessary to implement the standard. (See Dkt. No. 407 Ex. 12, Farrell *et al.*, 74 *Antitrust L. J.*
 9 at 643 (endorsing the use of pool rates as a "default method of apportioning royalties," while
 10 noting that individual patent owners would always be free to try to show that their patents were
 11 worth more than the average pool patents).) Here, [REDACTED]
 12 [REDACTED]
 13 [REDACTED]—meaning that the default pool
 14 rate should apply. See Wion Decl. Ex. 9 (Donohoe Dep.) at 183:5–12; Wion Decl. Ex. 10
 15 (Schmalensee Dep.) at 164:21–165:24.

16 In the end, [REDACTED]
 17 [REDACTED]

18 Wion Decl. Ex. 9 (Donohoe Dep.) at 17:3–17; Wion Decl. Ex. 10 (Schmalensee Dep.) at
 19 168:15–169:10. By that admission alone, the pool licenses are relevant evidence in this case,
 20 and Microsoft's experts' consideration of them entirely appropriate. Motorola's motion should
 21 be denied.
 22
 23

24 ⁴ Motorola's claim can hardly be taken seriously, given its insistence that its expert Charles Donohoe is free to
 25 copy the royalty rate from a license agreement that includes only a single Motorola patent declared essential to
 26 802.11—licensed among hundreds of other patents essential to other standards. (See Dkt. No. 462 (Defendants'
 Proposed Findings of Fact and Conclusions of Law) at ¶ 501 ("For a patent license to be a valid benchmark for a
 RAND rate for a patent portfolio, the patent license must include at least one of the patents in the portfolio.").)

1 DATED this 15th day of October, 2012.

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CERTIFICATE OF SERVICE

I, Linda Bledsoe, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
2. On the 15th day of October, 2012, I caused the preceding document to be served on counsel of record in the following manner:

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s/ Linda Bledsoe
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